FILED
MAR 24 1993
OFFICE OF THE CL

No. 92-528

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 2
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 3
Haitian Refugee Center v. *Baker*:
949 F.2d 1109 (11th Cir. 1991) 6
953 F.2d 1498 (11th Cir. 1992) 6
Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 5
Landon v. *Plasencia*, 459 U.S. 21 (1982) 2
Reid v. *Covert*, 354 U.S. 1 (1957) 3
Sale v. *Haitian Centers Council, Inc.*, No. 92-344 (argued Mar. 2, 1993) 1, 10
Shaughnessy v. *Mezei*, 345 U.S. 206 (1953) 5
United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 8
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) . 10
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) . 3, 5

Constitution, statutes and regulations:

U.S. Const.:
Amend. I 6
Amend. V (Due Process Clause) 3, 5, 6, 9, 10
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1226-1227 4
8 U.S.C. 1253(h) 7, 9
Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1991) 4, 8
U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 7
Art. 33 ..... 7, 9
Art. 33.1 7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-528

CHRIS SALE, ACTING COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

After our petition for writ of certiorari in the present case was filed, this Court granted our certiorari petition in *Sale* v. *Haitian Centers Council, Inc.*, No. 92-344, which arises out of the same underlying lawsuit as the instant petition and concerns the President's authority to authorize direct repatriation of interdicted migrants. No. 92-344 has been fully briefed and was argued on March 2, 1993. We continue to believe that the due process ruling of the Second Circuit in the instant case is so clearly incorrect that summary reversal is appropriate. In the alternative, however, we request the Court to hold the certiorari petition pending the Court's decision in No. 92-344.

1. The ruling at issue concerns the constitutional rights of aliens outside the United States to secure procedural protections that were not afforded by Congress: here, a claimed right to consult with counsel concerning their efforts to come to the United States and to avoid repatriation to Haiti. In defending the decision of the

Second Circuit, respondents do not question the well-established general principle that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). Rather, respondents adopt the Second Circuit's arguments that the present case is "unique" (Br. in Opp. 17), because (a) the respondent migrants here have been "screened in" as possessing a plausible claim of refugee status, and (b) they are held at Guantanamo Bay Naval Base, an area within the exclusive control of the United States government. See *id.* at 18-19. Respondents argue, in addition, that they seek only to avoid repatriation to Haiti and that prior decisions regarding the absence of constitutional rights on the part of aliens seeking admission to the United States are inapposite. See *id.* at 20-21. These factors, however, provide no basis for distinguishing the long line of precedent holding that aliens challenging immigration decisions have no constitutional rights to procedural protections that have not been afforded by Congress.

a. Respondents, like the Second Circuit, have entirely failed to explain how the INS's initial screening decision altered the *legal status* of the affected migrants or conferred a constitutionally protected liberty interest where none previously existed. The use of a two-step screening process was purely an internal management practice on the part of the INS; the decision to screen in a migrant did not reflect even a tentative conclusion that the individual was in fact a refugee, nor did it create a presumption of refugee status. By way of analogy, it is well established that an individual has no constitutionally protected liberty or property interest in obtaining public employment. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 575, 578 (1972). And it is surely not unusual for federal hiring officials to extend interviews only to a subset of the

applicant pool consisting of individuals who are thought to merit particularly serious consideration. Under the Second Circuit's reasoning, however, an applicant who is "screened in" to the pool that will be afforded interviews may thereby acquire a liberty or property interest in obtaining the federal job, entitling a federal court to determine what procedures are appropriate at subsequent stages of the selection process. More generally, the Second Circuit's reasoning suggests that an individual who has no liberty or property interest in a government benefit may acquire such an interest simply by passing some threshold standard of potential eligibility. Such a holding simply circumvents established due process jurisprudence.

b. In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), this Court noted that in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), it had emphatically "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." There is no basis for respondents' suggestion that the United States government's physical dominion over the Guantanamo Bay Naval Base transforms foreign soil into "sovereign territory," so as to trigger the protections of the Bill of Rights. *Reid* v. *Covert*, 354 U.S. 1 (1957), relied upon by respondents (Br. in Opp. 21, 22), involved the trial of an American citizen stationed at an American military base in England; yet the plurality (while holding that Mrs. Covert, as a *citizen*, was entitled to constitutional protections) quite plainly approached the case as one involving the *extraterritorial* application of American law. 354 U.S. at 5-6 (opinion of Black, J.); see also *Verdugo-Urquidez*, 494 U.S. at 269-270 (discussing *Reid*).[1]

---

[1] Moreover, as we have explained in our certiorari petition (at 17-18), the rule that aliens have no constitutional rights in connection with their efforts to obtain initial entry into this country applies even when

c. Nor is there merit to respondents' argument that cases rejecting the constitutional claims of aliens seeking admission to this country are inapposite to migrants who seek to avoid repatriation to Haiti. The United States government has stated repeatedly that it will transport interdicted Haitians to any third country that is willing to accept them. Absent such offers from third countries, however, the decision to deny interdicted migrants entry into the United States cannot be meaningfully distinguished from the decision to repatriate them to Haiti. Moreover, Executive Order No. 12,324, under which the migrants now at Guantanamo were interdicted, authorized interdiction (and subsequent repatriation) only "when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist." Pet. App. 265a.[2] The repatriation of Haitians interdicted under that Executive Order was thus inextricably intertwined with the United States' efforts to control the circumstances under which Haitian migrants will be permitted to enter this country.

The distinction drawn by respondents also finds no support in this Court's cases. For example, respondents' argument would necessarily mean that aliens in exclusion proceedings in the United States would have constitutional rights to challenge the manner in which the Attorney General designated the country to which they will be sent—a necessary part of the exclusion process—even though they have no constitutional rights to challenge the procedures used to determine their eligibility for admission. Yet both decisions are an integral part of a single exclusion proceeding, see 8 U.S.C. 1226-1227, and this Court has definitively held that such

---

aliens are detained *on U.S. soil* pending a determination as to their eligibility for admission.

[2] Hereinafter, "Pet. App." refers to the appendix to the petition for certiorari in No. 92-344.

proceedings are not governed by the strictures of the Due Process Clause. See, *e.g.*, *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950). Similarly, in *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953), this Court held that an excluded alien did not acquire procedural due process rights by virtue of the fact that he was indefinitely "stranded" in U.S. custody on Ellis Island "because other countries [would] not take him back." 345 U.S. at 207. As in *Mezei*, respondents simply have no constitutional rights to challenge the manner in which the United States seeks to effectuate a bar to their entry—whether that bar is achieved by providing "temporary harborage," 345 U.S. at 215, on Ellis Island (or Guantanamo), or by transporting the alien to the territory of another nation.

Finally, to the extent respondents contend that they do not seek entry into the United States, that contention serves only to further attenuate their nexus to this country and their claim to special protections under our Constitution. And as noted above, this Court recently reiterated in *Verdugo-Urquidez* its "emphatic" "rejection of extraterritorial application of the Fifth Amendment" in *Johnson* v. *Eisentrager* to aliens with respect to matters arising outside the United States, see 494 U.S. at 269, not merely to their attempted entry into the United States.[3]

---

[3] Contrary to respondents' suggestion (Br. in Opp. 22), the Chief Justice's opinion in *Verdugo-Urquidez* commanded a majority of the Court. Although Justice Kennedy filed a concurring opinion, he expressly joined the opinion of the Court, 494 U.S. at 275, and endorsed what he termed the "persuasive justifications" for the result it reached, *id.* at 278, while adding several others of his own. In fact, Justice Kennedy emphasized the importance of the distinction between aliens and citizens with respect to the extraterritorial application of the Constitution, see *id.* at 275, and found the Fourth Amendment inapplicable there even though the alien was physically present in the United States, *id.* at 278. Nowhere did Justice Kennedy suggest that the Fifth Amendment would apply to immigration matters concerning an alien outside the United States.

2. If this Court decides not to summarily reverse the decision at this time, we believe it is appropriate to hold the petition pending the Court's disposition of No. 92-344. In several important respects, the decision in No. 92-344 may further demonstrate that the Second Circuit plainly erred in this case. See Pet. 28-29.

a. In both the present case and No. 92-344, the government has argued that the plaintiffs' claims are barred by collateral estoppel, based on the Eleventh Circuit's decisions in *Haitian Refugee Center (HRC)* v. *Baker*.[4] The Second Circuit in the present case gave two reasons for rejecting the government's position. It held (1) that the plaintiff class in *HRC* was composed of "screened out" migrants whose lawsuit could not bind the "screened in" plaintiffs in the present case, Pet. App. 93a-96a, and (2) that changes in INS policy since the culmination of *HRC*

Respondents argue (Br. in Opp. 15) that review should be denied because six claims are now the subject of the trial in the district court, while only one of these claims—the due process right to counsel—is presented here. In fact, however, four of the six claims respondents identify (Br. in Opp. 6-7 n.6) rest on the Due Process Clause, and therefore would be disposed of if this Court were to hold on the instant petition that the Due Process Clause does not apply to aliens outside the United States with respect to extraterritorial matters. The remaining constitutional claim pending in the district court is asserted not by the Haitian migrants, but by Haitian service organizations, who claim a First Amendment right of access to Guantanamo. That claim is without merit, and it would not in any event support an injunction barring repatriation of Haitian migrants until personnel from the Haitian service organizations have exercised their supposed First Amendment rights. The sixth claim cited by respondent (Br. in Opp. 15) is statutory—an APA claim that it was arbitrary and capricious to reinterview the "screened in" Haitians. That claim is precluded for the reasons stated in our brief in No. 92-344 (at 13-18) and is, in any event, frivolous in view of the current medical exclusion of HIV positive aliens.

[4] The Eleventh Circuit's opinions (Pet. App. 171a-189a, 190a-252a) are reported at 949 F.2d 1109 (1991) and 953 F.2d 1498 (1992), respectively.

rendered collateral estoppel inapplicable, Pet. App. 96a. Respondents in No. 92-344 resist the application of collateral estoppel on essentially the same grounds. Thus, they argue that "[t]he 'screened-out' and 'screened-in' Haitians neither shared the same interest in challenging screening nor suffered the same injury from it" (92-344 Resp. Br. 43; see generally *id.* at 41-45), and that changes in circumstances since the *HRC* litigation would make it "inequitable" for *HRC* to be given preclusive effect (92-344 Resp. Br. 47-49). It is therefore likely that this Court's resolution of the collateral estoppel issue in No. 92-344 will bear directly on the correctness of the Second Circuit's holding in the present case.

b. In holding that respondents in the present case had demonstrated the presence of sufficiently serious legal questions to warrant a preliminary injunction, the Second Circuit relied in part on its conclusion that

> "[s]creening in" a Haitian alien implicates the Agreement Between the United States and Haiti, the Refugee Act of 1980, the Executive Order and the Protocol, to which we are a signatory. These affirmative actions by the Executive Branch and Congress can fairly be said to have established a reasonable expectation by the "screened in" plaintiffs in not being wrongly repatriated; we believe this expectation to be protected by the due process clause.

Pet. App. 112a-113a. Implicit in the court's analysis is the assumption that the Refugee Act of 1980 (or, more specifically, 8 U.S.C. 1253(h)) and the Protocol confer rights of non-repatriation upon refugees who have not reached the United States. In No. 92-344, however, we argue that neither Section 1253(h) nor Article 33 of the U.N. Convention Relating to the Status of Refugees[5] restricts

---

[5] The United States acceded to Article 33.1 of the Convention by ratifying the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

the activities of U.S. officials outside the United States. See 92-344 Gov't Br. 27-55. Rather, in our view, the Act and Convention prohibit the U.S. government from repatriating only those refugees who are physically present in the United States and can demonstrate a threat of persecution. Acceptance of that position by this Court in No. 92-344 would severely undermine the Second Circuit's conclusion that the plaintiffs in the present case—who have never reached the United States but instead are housed at an American military base on hostile foreign soil —possess a liberty interest in avoiding repatriation to Haiti. We likewise argue in our reply brief in No. 92-344 (at 29-30)—in answering the reliance by the respondents there on the 1981 Agreement between Haiti and the United States—that the Agreement is merely a law enforcement agreement between two governments and does not confer any private rights on individual Haitian migrants that are judicially enforceable in U.S. courts. If the Court so holds, that basis cited by the Second Circuit for finding that the respondents here have a protected liberty interest would likewise be eliminated.[6]

3. Respondents contend that, even if the issues in this case are substantially related to those in No. 92-344, the petition should be denied rather than held because (a) the decision under review is interlocutory, and (b) trial of this case is currently ongoing in the district court. In the circumstances of this litigation, those arguments in fact counsel in favor of summary reversal, not a denial of certiorari.

a. The interlocutory character of an appellate decision is certainly relevant to the question whether a case

---

[6] The remaining source of a liberty interest cited by the Second Circuit was Executive Order No. 12,324. See Pet. App. 112a-113a. However, as we have pointed out (Pet. 20 & n.14), that Executive Order has been rescinded, and therefore could no longer be a source of a liberty interest, and it did not confer any judicially enforceable rights when it was in effect.

warrants plenary review by this Court. See Br. in Opp. 13-14 (citing *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)). But here, the preliminary injunction affirmed by the Second Circuit clearly conflicts with prior Due Process rulings of this Court concerning the rights of aliens outside the United States; unquestionably restricts the President's options for responding to the Haitian migrant crisis (see Pet. 27); and necessitates ongoing disruptive litigation of issues that were already adjudicated and decided in the government's favor in *HRC* v. *Baker*, *supra*. Under these circumstances, summary reversal is certainly warranted. In any event, respondents identify no reason why the interlocutory posture of the decision below should induce this Court to deny the petition, rather than to hold it pending resolution of No. 92-344. Nor is there any reason why the Court should refrain from granting review and reversing or vacating the decision below in light of its decision in No. 92-344, if that decision casts still further doubt upon the Second Circuit's disposition of the instant case.[7]

b. The pendency of an ongoing trial in the district court also provides no basis for denying the petition at the present time. The fact that the trial is currently ongoing makes clear that the proceedings on remand are not being held in abeyance pending this Court's disposition of the petition for certiorari, and that holding the petition will not delay the ultimate resolution of the lawsuit. Further,

---

[7] If the Court holds in No. 92-344 that judicial review is precluded —and therefore does not rule in that case on the extraterritorial application of Section 1253(h) (and Article 33)—it could choose to address the latter issues (which have been fully briefed) by granting certiorari and deciding the instant case at the same time it renders its decision in No. 92-344. It could then hold in the instant case that neither Section 1253(h) nor Article 33 affords rights to the respondent migrants that could give rise to a liberty interest protected by the Due Process Clause, as the Second Circuit held. Alternatively, the Court could simply hold that the Due Process Clause is altogether inapplicable in this setting.

summary reversal could expedite—not delay—the ultimate disposition of these proceedings.

It is possible, of course, that future events in the district court might have a bearing on this Court's ultimate disposition of the instant petition, and for that reason we will apprise this Court of relevant developments in the district court proceedings. It is clear, however, that at least for now the preliminary injunction ordered by the Second Circuit continues to impose substantial legal disabilities upon the government. The mere *possibility* that this case may become moot prior to the resolution of No. 92-344 provides no basis for denial of our petition at the present time. And, if the Second Circuit's affirmance of the preliminary injunction at issue here should later become moot prior to the Court's disposition of the petition for certiorari, the proper course would be to vacate the decision of the Second Circuit, not to deny the petition. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

* * * * *

The Court should grant the petition as to question 1 and summarily reverse the judgment below, on the ground that Haitian interdictees outside the United States have no rights under the Due Process Clause in connection with their efforts to enter the United States or other matters arising outside the United States. In the alternative, the Court should hold the petition pending the disposition of *Sale* v. *Haitian Centers Council, Inc.*, No. 92-344 (argued March 2, 1993).

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1993